

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 802

JESSE S. SHIMA,

Petitioner,

v.

THOMAS A. BROWN.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

The opinion of the Court of Appeals appears in the record at page 33, and is reported 6 *Federal Rules Service*, 53 e. 32, Case 1.

The questions presented, the Statutes and Federal Rule involved, Statements of Jurisdiction and of the Case, and Reasons Relied Upon, appear in the foregoing Petition, and in the interest of brevity are not repeated here.

Specification of Error.

It was error for the Court of Appeals to hold (a) that Federal Rule 53 (e) (3) invalidates said District of Columbia Code provisions, and (b) that the question is procedural.

ARGUMENT.

I.

The Acts of Congress, comprising Sections 102-106, Title 16, District of Columbia Code, 1940, whether they grant substantive rights or are merely procedural, are not repealed or invalidated by the provisions of Federal Rule of Civil Procedure 53 (e) (3).

This Court held in *Sibbach* v. *Wilson and Co., Inc.*, 312 U. S. 1, 9, 10, that:

> "Congress has undoubted power to regulate the practice and procedure of Federal Courts, and may exercise that power by delegating to this or other Federal Courts authority to make rules *not inconsistent with the Statutes or Constitution of the United States.*" (Italicizing supplied.)

(a.)

The Court of Appeals held herein that the Code provisions are contrary to the Rule, which means that the Rule is inconsistent with the Code provisions.

Under Federal Rule of Civil Procedure 81 (e), it is provided that "when the term 'statute of the United States' is used, it includes, so far as concerns proceedings in the District Court of the United States for the District of Columbia, any Act of Congress locally applicable and in force in the District of Columbia."

When legislating for the District of Columbia under the eighth Section to the first Article of the Constitution, Congress is still the legislature of the Union, and its Acts are the laws of the United States. *Mattingly* v. *District of Columbia,* 97 U. S. 687, 690; *Cohens* v. *State of Virginia,* 19 U. S. 264, 6 Wheat. 264, 5 L. ed. 257; *Neild* v. *District of Columbia,* 71 App. D. C. 306, 110 F. 2d 246.

Accordingly, said District Code provisions are statutes of the United States; and as under the decision of the Appellate Court, they are contrary to the Rule, and are therefore inconsistent with the latter, the authority to make the Rule was not, and could not be, delegated by Congress, under *Sibbach* v. *Wilson,* supra.

(b.)

Article 1, Section 1, of the Constitution provides that "all legislative powers herein granted shall be vested in a Congress of the United States."

The District of Columbia is a permanent part of the United States—the very heart of the Union over which Congress has permanent and exclusive power of legislation. *O'Donoghue* v. *United States,* 289 U. S. 516, 518. Congress has plenary and exclusive power to legislate for the District of Columbia. *Sims* v. *Rives,* 84 F. 2d 871, 66 App. D. C. 24, certiorari denied, 56 S. Ct. 950, 298 U. S. 682, 80 L. ed. 1402.

Therefore, it appears that Rule 53 (e) (3) falls within the further proscription announced in *Sibbach* v. *Wilson,* in that its effect, as declared by the Court of Appeals of invalidating a contrary Code provision, is inconsistent with the Constitution, under which Congress has plenary and *exclusive* authority as a national legislature to legislate for the District of Columbia.

(c.)

This Court cannot exercise authority to repeal an Act of Congress; and neither Congress nor the Executive can commit legislative or executive functions to this Court, or require their performance by it. If this Court can repeal these, or other, Acts of Congress, the question will arise as to where the exercise of such power might ulti-

mately lead. Also, only this Court can pass finally on the juridical issue of its right to receive and exercise delegated power to repeal Acts of Congress. If this Court through Rules could repeal Acts of Congress, the result might ensue of virtual nullification in such instances of the right of appeal to this Court upon the above juridical issue thereby arising, because the assumption would necessarily lie that this Court, by its prior issuance of such Rules, had already determined that it possessed the requisite power.

> "This Court * * * has no legislative powers. It cannot amend or modify any legislative Acts." *License Tax Cases,* 5 Wall. 462, 469.
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> "It is therefore apparent that from its earliest history this Court has consistently declined to exercise any powers other than those which are strictly judicial in their nature." *Muskrat et al.* v. *United States,* 219 U. S. 346, 356.

(d.)

Article 1, Section 7, Clause 2 of the Constitution, provides that every Bill which has passed the House and Senate shall be presented, before it becomes a law, to the President who shall sign it if he approves; that if he does not approve he shall return it with his objections; that in such latter event, it may become a law only by passage by two-thirds of both House and Senate.

As the President has such Constitutional right to participate in the enactment of Acts of Congress, he has the corresponding right to participate directly in their appeal, of which right he stands divested by a holding that Acts of Congress are repealed or invalidated by Federal Rules of Civil Procedure. Any attempt by Congress to delegate its legislative power is also an attempt to delegate the above-indicated Constitutional power of the Executive.

(e.)

To have the force of legislation which it is now attempted to ascribe to them, the Federal Rules should have been clothed in the form of Acts of Congress, duly enacted as provided under the Constitution. Or, if Congress had in fact intended to establish the supremacy of the Federal Rules over existing and conflicting Acts of Congress, it would have specifically and promptly repealed the latter by direct and express legislation.

II.

The Acts of Congress, comprising said sections of the District of Columbia Code, provide substantive rights; and the application by the District Court of Rule 53 (e) (3), instead of said Acts of Congress, abridged and modified petitioner's substantive rights.

Said Act of Congress of June 19, 1934, provides that "said Rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant."

(a.)

When the first judgment for respondent was set aside upon his own motion, opposed by petitioner, and new trial granted, with consent reference then to the District Court's Auditor under said Code provisions, respondent's motion to instruct the Auditor as to the range of his Report being overruled, petitioner acquired the substantive right to have adjudged as final such findings effected under the reference as remained without exceptions thirty days after the filing of the Auditor's Report. By consenting to the reference, respondent waived the right of jury trial except upon issues raised by any exceptions; and when he filed

no exceptions, he fully waived the right of jury trial. At the immediate outset of the last trial, petitioner sought to withdraw his own exceptions (permissible under *Gilbert* v. *Association,* 21 App. D. C. 344), which would have left the Report entirely without exceptions after thirty days, and the cause devoid of any jury issue.

Otherwise stated, respondent waived his right to a jury trial, first, when he consented in writing to said reference, which by plain provision of law dispensed with jury trial and substituted trial to the Court, except in the instance of filing of exceptions to the Auditor's Report raising a jury issue. By his failure to file exceptions later, respondent again waived any right to jury trial, that is, he failed to take any action to bring the case within the only circumstance which would serve to nullify the effect of his former waiver of trial by jury. Hence, the trial could only have been to the Court, unless petitioner took steps to require trial by jury. But the latter expressly took steps to waive and avoid any such jury trial, by moving in open court to withdraw his exceptions and submit the case to the Court upon the conclusive findings of fact of the Auditor's Report. Therefore, the trial was to the Court, not to a jury, and Rule 53 (e) (3), which applies only to jury trials, was in effect inapplicable.

(b)

Over a period of years required for successive trials as here, witnesses become unavailable through moving elsewhere without known address. Those who remain in the jurisdiction tire of so many court appearances in the same case, and finally become unwilling, or even hostile, witnesses. During the course of all the hearings before the District Court's Auditor, the United States and Japan were at peace, but were at war at the time of the third and last trial, which was of great disadvantage to petitioner, a Japa-

nese national, brought into court as a defendant. For example, his key witness at prior trial, a U. S. Government employee, refused absolutely to testify for him at the last trial, and became very hostile, solely because of such state of war. Two of the panel of jurors at the last trial stated with emotion on the voir dire in the presence of the rest of the panel from which the jury was ultimately selected, that they would be unable to render a fair verdict herein because they could not forget Pearl Harbor.

Accordingly, denial of petitioner's motion to withdraw his exceptions, thereby leaving none at all, and to have the Code provisions thereafter applied, constituted abridgment or modification of petitioner's *substantive* rights, as the petitioner was then required to defend himself for a third time, at substantial additional expense, and at greater disadvantage, upon identical issues tried previously upon consent reference in a comprehensive trial before the District Court's Auditor, who had expressly remained uninstructed, the costs alone under such reference approximating $1,000.00.

(c)

Said Section 104, Title 16, District Code, provides that if the issues are so numerous as to create confusion, the Court may direct the jury to conclude as to a part of the issues before hearing evidence as to the other issues, this to repeat as often as may be necessary, their final conclusion as to all issues to be announced as their verdict, or may submit different issues to the same jury at different times for their separate verdicts; or may submit such issues to different juries; or may pursue such other course as the Court rules may prescribe to facilitate the determination of such issues.

Without any doubt, the issues in this cause are so numerous as to cause confusion, as appears from the pleadings

(R. 1-16), opinion of the Court of Appeals (R. 33, 34), and Statement of the Case, hereinabove.

Did petitioner request board for himself and wife, promising to pay a fair and reasonable sum? Or did respondent affirmatively seek their services in exchange for their board during such time as they should reside with him? If the former, then did petitioner make payments on account? Or were monies which passed to respondent from petitioner, loans or gifts? If the latter, what services, if any, did petitioner and his wife perform? Were they in full or partial compensation? Or were they wholly gratuitous? Did petitioner and wife receive board during the full eight years? Or during only part of that time? Is the Statute of Limitations a bar to recovery of any items? If so, as to which?

As the Court of Appeals found, respondent's statement listed some ninety-seven items, all of which are contested.

Due to the obvious complexity of the cause, and to the accounting aspects involved, the application of any Federal Rule which placed all issues, simultaneously, with the same jury for a single determination upon all issues, as occurred at the final trial, was not feasible (Federal Rule 86), and deprived petitioner of the further substantive right under said Acts of Congress, to seek to have each issue considered separately by the jury, their final conclusion as to all issues to be announced as their verdict, or to have the different issues considered by the jury at different times for separate verdicts thereon, or to have such issues submitted to different juries, or to have such other course pursued as the court rules may prescribe to facilitate the determination of such issues.

(d.)

Rights which superficially appear to be procedural, may be substantive, or may combine both characteristics. *Cities*

Service Oil Co. v. *Dunlop,* 308 U. S. 208, 60 S. Ct. 201, 84 L. ed. 196; *Erie Railroad Company* v. *Tompkins,* 304 U. S. 64, 58 S. Ct. 817, 82 L. ed. 1188.

In his dissenting opinion in *Sibbach* v. *Wilson,* supra, Mr. Justice Frankfurter observed in part, at page 17, 312 U. S.:

> "It does not seem to me that the answer to our question is to be found by an analytic determination whether the power of examination here claimed is a matter of procedure or a matter of substance, *even assuming that the two are mutually exclusive categories with easily ascertainable contents*" (Italics supplied).

And again therein at page 18, he refers to "so-called procedural matters."

Conclusion.

WHEREFORE, it is respectfully submitted that this petition for certiorari should be granted.

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